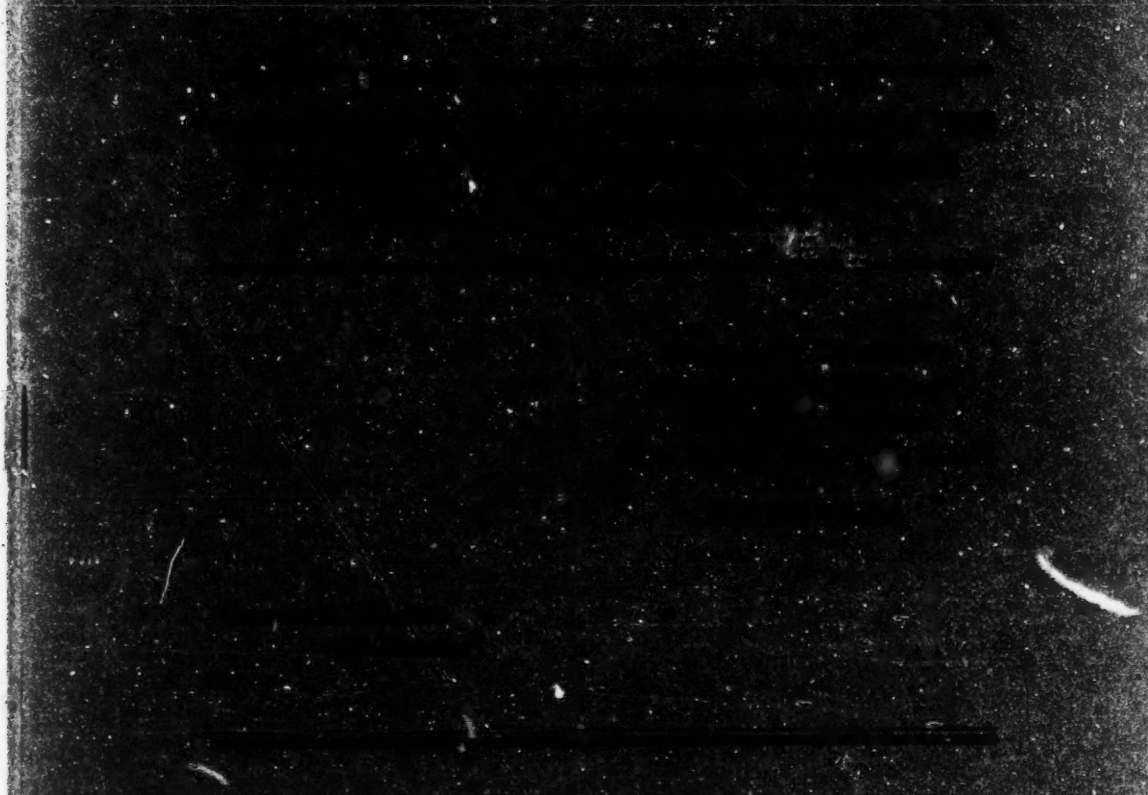

TABLE OF CONTENTS

	PAGE
OPINIONS BELOW	2
JURISDICTION	2
QUESTIONS PRESENTED	2
STATUTES INVOLVED	3
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	8
CONCLUSION	17

TABLE OF AUTHORITIES

Cases:

Brotherhood of Railroad Trainmen v. Chicago & Illinois R., 375 U. S. 18 (1963) 17

Brotherhood of Railroad Trainmen v. Chicago River & Indiana R. Co., 353 U. S. 30 (1957) 14, 15

Brotherhood of Railroad Trainmen v. Howard, 343 U. S. 768 (1952) 14

Brotherhood of Railroad Trainmen v. Toledo, P. & W. R., 321 U. S. 50 (1944) 14

Brotherhood of Railway & Steamship Clerks v. United Transport Service Employees, 320 U. S. 715 (1943) 14

General Committee v. M-K-T R., 320 U. S. 323 (1943) 13, 14

General Committee v. Southern Pacific Co., 320 U. S. 338 (1943) 13–14

PAGE

International Association of Machinists v. Central Airlines, Inc., 372 U. S. 682 (1963) 14

Order of Railroad Telegraphers v. Chicago & North Western R. Co., 362 U. S. 330 (1960) 15

Publishers Association v. New York Mailers Union, 376 U. S. 775 (1964) 17

Ruby v. American Airlines, Inc., 323 F. 2d 248 (2 Cir. 1963), certiorari denied, 376 U. S. 913 ..... 2, 7

Ruby v. American Airlines, Inc., 329 F. 2d 11 (2 Cir. 1964) 2

Switchmen's Union v. National Mediation Board, 320 U. S. 297 (1943) 14

United States v. Parke, Davis & Company, 362 U. S. 29 (1960) 10

Virginian Railway Co. v. System Federation No. 40, 300 U. S. 515 (1937) 10, 13

Statutes:

Norris-LaGuardia Act
29 U. S. C. §107 ..... 3, 16
29 U. S. C. §108 ..... 3, 16

Railway Labor Act
45 U. S. C. §152 ..... 3, 10, 13, 16
45 U. S. C. §155 ..... 3, 13
45 U. S. C. §181 3
45 U. S. C. §183 ..... 3, 13

PAGE

Other Authorities:

Executive Order 10921 4

Feinsinger Commission Reports:
May 24, 1961 5
October 17, 1961 ..... 5, 11

Federal Rules of Civil Procedure:
52(a) 9, 10

Jacobs, Dead Horse and the Featherbird (Fund for the Republic: Center for the Study of Democratic Institutions, 1962) 4

Note, 77 Harv. L. Rev. 1150 (April, 1964) 16

Report of the Senate Committee on the Judiciary on the Norris-LaGuardia Act (S. Rep. No. 163, 72d Cong., 1st Sess. (1932) 16

IN THE

Supreme Court of the United States

October Term, 1964

No. .....

AMERICAN AIRLINES, INC.,

Petitioner,

v.

JOSEPH V. MANNING, as President of the American Airlines Chapter, Flight Engineers' International Association AFL-CIO, and AMERICAN AIRLINES CHAPTER, FLIGHT ENGINEERS' INTERNATIONAL ASSOCIATION, AFL-CIO, an unincorporated association,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

American Airlines, Inc. petitions for a writ of certiorari to review a judgment in the above entitled case by the United States Court of Appeals for the Second Circuit. The judgment affirms a preliminary injunction based on a finding that the Company had refused to bargain with respondent flight engineer union.

Opinions Below

The opinion of the Court of Appeals is reported as *Ruby* v. *American Airlines, Inc.*, 329 F. 2d 11 (2 Cir. 1964), and is set forth in the Joint Appendix at pp. 1-41.* A related decision arising out of the same case, and containing pertinent background information, is reported as *Ruby* v. *American Airlines, Inc.*, 323 F. 2d 248 (2 Cir. 1963), certiorari denied, 376 U. S. 913. It is set forth in the Joint Appendix at pp. 53-69. The opinion of the United States District Court for the Southern District of New York is reported in 221 F. Supp. 301 (R. 1b-57b).**

Jurisdiction

The judgment of the Court of Appeals was entered on February 14, 1964 (Jt. App. 42-43). Rehearing was denied on April 10, 1964 (Jt. App. 44-45). On July 1, 1964, Mr. Justice Harlan extended the time for petitioning for certiorari until September 5, 1964 (Jt. App. 48). The jurisdiction of this Court is invoked under 28 U. S. C. §1254(1).

Questions Presented

1. ". . . whether the Railway Labor Act prohibits an employer who faces the demands of two employee groups that call for a joint solution from insisting that the negotiations be held simultaneously in one room and across one

---

* Additional parties below also are filing a separate petition for certiorari. A Joint Appendix therefore has been prepared for use with both petitions.

** "R." citations herein all refer to Volumes II and III of the Record in the Court of Appeals. Pages in Volume II are cited with suffix "a", and pages in Volume III are cited with the suffix "b".

table, and requires him instead to negotiate across two tables in two separate rooms, running back and forth from one to the other."*

2. Does the National Mediation Board have exclusive or primary jurisdiction over the question of whether an employer has bargained properly, when the bargaining is being conducted under the Board's auspices?

3. Are the requirements of the Norris-LaGuardia Act applicable in an injunction suit by a union against an employer covered by the Railway Labor Act?

Statutes Involved

The statutes involved are the Railway Labor Act and the Norris-LaGuardia Act, and particularly 45 U. S. C. §§152 Ninth, 155, 181, 183 and 29 U. S. C. §§107 and 108 thereof, which are set forth in the Joint Appendix at pp. 70-83.

Statement of the Case

This case involves an injunction requiring bargaining by an employer in a labor dispute. However, as set forth more fully below, there was no absence of bargaining in the sense of *meetings* between the employer and the union; when the lawsuit began, meetings were not only being held, but were being held under the auspices of the Chairman of the National Mediation Board. Thus, the injunction was

* From the dissenting opinion in the instant case by Hon. Henry J. Friendly, U. S. C. J., 329 F. 2d at 23-24 (Jt. App. 25).

not based on any failure to meet, but on positions asserted in the meetings themselves.

Nor was the assertion of such positions the immediate cause of the litigation. Instead, the litigation was commenced because of a suit by another union, involving an internal schism within another group of employees, in which suit respondent union intervened.

The facts of the case arise out of the airline "crew complement dispute", a dispute which already has produced a dozen Presidential boards and commissions, almost as many strikes, and a great deal of high-level mediation.*

The crew complement dispute involves the manning of cockpit positions in large jet aircraft operated by U. S. air carriers. On petitioner American Airlines, Inc., cockpit positions on such aircraft are manned by pilots and flight engineers, represented by separate unions.**

In 1961, a special commission, popularly known as the Feinsinger Commission, was appointed by the President to investigate the crew complement dispute on American and six other airlines. Executive Order 10921 established the Commission ". . . to consider differences that have arisen regarding the performance of the flight engineer's

* The crew complement dispute is described in detail in JACOBS, DEAD HORSE AND THE FEATHERBIRD (Fund for the Republic: Center for the Study of Democratic Institutions, 1962).

** For convenience in terminology, the unions are referred to herein simply as the "pilot union" and the "flight engineer union". The flight engineer union is respondent in connection with this petition. The pilot union, an appellant below, is filing a separate petition for certiorari.

function, the job security of employees performing such function, and related representation rights of the unions . . . ."

On the matter of representation, the Feinsinger Commission concluded (i) that ". . . neither peace nor safety on the airlines will be fully assured as long as there are two unions in the cockpit", and (ii) that ". . . eventual representation of all flight deck crew personnel by a single union is inevitable".*

The particular negotiations in question were initiated at the request of the Secretary of Labor in 1962 and were conducted continuously under the personal auspices of the Chairman of the National Mediation Board (R. 14b). The purpose was to resolve the crew complement dispute with both unions.

Bargaining resulted in a proposal by the pilot union, in August 1962, which contemplated single representation of all cockpit employees by one union (R. 15b). Both pilots and flight engineers agreed to negotiate on that basis; consequently, joint negotiations with all three parties participating took place from November 1, 1962, until almost March 1, 1963 (R. 17b-19b).

In December 1962, however, an internal schism developed in the pilot union (R. 24b). The pilot schism was not resolved. It resulted in a lawsuit filed by the pilot union on March 1. The purpose of the suit was to stop the pilots' negotiating committee from participating further in the joint negotiations.

* Report of May 24, 1961, p. 22; Report of October 17, 1961, p. 12.

A week earlier, the flight engineer union had withdrawn from the joint negotiations to attend a membership meeting in Los Angeles (R. 38b). After the meeting, the pilot suit had been filed, and the flight engineers did not return to the joint negotiations. In the meantime, the Company and the flight engineer union exchanged opening notices as required under their current agreement (R. 39b).

Thereafter, the Company and the flight engineer union attended what were termed "bull sessions", called by Mr. Leverett Edwards, Chairman of the National Mediation Board, on March 6, 8, and 12, 1963, to discuss procedures for continued bargaining (R. 39b). The dates are important because it was on March 12, while the "bull sessions" were taking place, that the flight engineer union sued to intervene in the pilot litigation. As a result of the suit, for a time the only further meetings occurred in the courtroom.*

In the "bull sessions", the flight engineer union sought to start a new, separate series of negotiations. The Company argued that the flight engineers should return to the joint negotiations and, in fact, that they were obligated to do so by virtue of prior bargaining commitments, including certain initialed provisions which had been delivered to the mediator and "redded out" (R. 20b).** Although the courts below have said that the Company's position was not well founded, the Company contended that the dispute was within the exclusive jurisdiction of the National Media-

* There were 21 days in court, more than 3,600 pages of depositions and trial transcript, and hundreds of exhibits (Jt. App. 37-38).

** "Redding out" is a process used by the Chairman of the NMB to indicate the completion of bargaining on the items so treated.

tion Board and, on May 16, 1964, filed a petition with the Board, seeking a determination (R. 60b-70b). The petition remains pending.

Whatever the merits of the Company's earlier position, it voluntarily initiated separate bargaining with the flight engineer union in July 1963—more than a month *before* the decision of the District Court (R. 44b-45b). Resumption of bargaining was possible because (i) the Company and the pilots' new union entered into a working agreement covering pilots on July 9, 1963, and (ii) in connection with that agreement, the pilots relinquished demands which had previously affected the flight engineers.

The District Court's hearings were completed on May 3 but, when bargaining resumed in July, there had been no ruling on the motion for a preliminary injunction (R. 44b). American Airlines therefore submitted a suggestion of mootness based on the voluntary resumption of flight engineer bargaining (R. 44b-45b).

The District Court rejected the suggestion of mootness (R. 45b-48b). On August 12, 1963, it filed an opinion in favor of American Airlines with respect to the pilot part of the case but against the Company with respect to the flight engineers (R. 55b). A preliminary injunction was issued requiring flight engineer bargaining (R. 3a-5a). The two aspects of the case were severed by the District Court *sua sponte*, and appeals followed (R. 57b). The denial of an injunction in the pilot part of the case was affirmed.* The preliminary injunction in the flight engineer part of

* *Ruby* v. *American Airlines, Inc.*, 323 F. 2d 248 (2 Cir. 1963), certiorari denied, 376 U. S. 913 (Jt. App. 53-59).

the case was affirmed separately, by a different panel of Judges, and is the subject of this petition. The opinion of Judge Medina was concurred in by Chief Judge Lumbard. Judge Friendly dissented from both the decision on the merits and the denial of rehearing (Jt. App. 22, 44).

Reasons for Granting the Writ

The sections of the discussion below follow the same order as the corresponding questions presented above at pp. 2-3.

I

To the majority in the Court of Appeals, "the critical finding that lies at the heart of this appeal", is as follows (329 F. 2d at 13; Jt. App. 3):

> "From at least as early as January 31, 1963 to July 11, 1963, the Company refused to bargain collectively with the Chapter, and until at least as late as March 15, 1963 the Company instead bargained collectively in respect of flight engineers only with a committee, of which O'Connell was Chairman, and which the Company claimed represented the flight engineers."

In the eyes of the majority, the foregoing quotation from the District Court opinion ". . . is a finding of a pure, unadulterated fact . . . [which] cannot be disregarded or set aside unless clearly erroneous" (*ibid.*).

Judge Friendly emphatically disagreed: "Calling a judge's legal conclusion a finding of fact is an all too easy

way for appellate judges to obscure or even avoid legal issues when the result of the trial suits them"; under the National Labor Relations Act, "the ultimate conclusion that, on such facts and inferences therefrom, an employer or a union has refused to bargain in violation of its legal duty has been deemed open to full review" (329 F. 2d at 23; Jt. App. 24, 25). What the District Judge meant by the quoted statement, Judge Friendly said, "one cannot be sure": if he meant that "American had violated a legal duty by insisting on joint bargaining"—"his conclusion was wrong as a matter of law"; if he meant that American had done "something more"—"[the finding] would be 'clearly erroneous' as a matter of fact" (329 F. 2d at 26; Jt. App. 30).

The difficulty with viewing the District Court's statement as a "pure, unadulterated fact" is twofold:

A. In the first place, the statement is not in that part of the opinion in which the facts are set forth; it is found instead in the latter part of the opinion, three pages from the end, in the context of a discussion of the law (R. 53b). If intended to serve as a finding of fact, the requirement of Fed. R. Civ. P. 52(a)—that such findings are to be "separately stated" from the conclusions of law—plainly was not observed by the District Court:

> "In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; *and in granting or refusing interlocutory injunctions the court shall similarly set*

forth the findings of fact and conclusions of law which constitute the grounds of its actions." (Emphasis added.)

The effect of the District Court's failure to comply with the foregoing requirement was to cause a disagreement within the panel of judges in the Court of Appeals (329 F. 2d at 22-24, 26; Jt. App. 23-25, 30). The avoidance of speculation and lengthy debate on appeal as to whether the District Court used such a statement as a finding of fact or a conclusion of law is, of course, the precise reason for the requirement of Fed. R. Civ. P. 52(a).

B. The second difficulty in viewing the District Court's statement as a finding of "pure, unadulterated fact", virtually immune from appellate review, is that what was found objectionable was not the Company's refusal to *meet*, but the positions taken by the Company in the very act of meeting. Thus the statement is a qualitative judgment as to what was taking place, and a qualitative judgment of this kind presupposes the application of a legal standard. Here, the applicable legal standard is derived from the meaning of the words "treat with" as used in Section 2 Ninth of the Railway Labor Act (45 U. S. C. §152 Ninth). *Virginian Railway Co. v. System Federation No. 40*, 300 U. S. 515 at 547-548 (1937). When such a finding is "premised . . . on an erroneous interpretation of the standard to be applied", the "unless clearly erroneous" rule does not apply to bar appellate review. *United States* v. *Parke, Davis & Company*, 362 U. S. 29 at 44 (1960).

It is important to recall that the underlying purpose of the negotiations from the very beginning was to provide a solution to the crew complement problem and that all parties agreed, including the many Presidential boards and commissions called upon to investigate the matter, that single representation was the solution which the situation required. Thus, American was bargaining, and no doubt bargaining strenuously, to accomplish the safety-in-the-cockpit-through-one-union recommendation of the Feinsinger Commission. Moreover, the joint bargaining which American sought to preserve also accorded with the Commission's suggestion.*

It may be that in view of the pilot schism, the engineers could legitimately undertake to withdraw from their initialed commitments. But, if this is accepted as a legitimate exercise of bargaining power, or bargaining stratagem, it must be equally true that the Company had a comparable right to seek to preserve the benefits of the prior bargaining by suggesting or urging that negotiations continue through the joint committee and with the same objective of one union—one contract.

The situation here points up why courts should be slow to intrude in the bargaining process. If bargaining is to work, the parties must be free to take positions which, regardless of their merits or demerits months later to a court, might advance bargaining in the direction of an agreement.

---

* "The Commission suggests that progress toward further improvement of relationships take the form of meaningful consultation and, if found to be practicable, *joint bargaining* concerning rates of pay, rules, and working conditions applicable to the third seat on three-man turbojet crews." Report of October 17, 1961, pp. 14-15; emphasis added.

By any objective test, American's position *had not* stifled bargaining: there were meetings, talks, proposals, counter-proposals, etc. Whatever the therapeutic value of face to face confrontation across a bargaining table, it was being brought into play—in joint meetings and separate "bull sessions"—and in the presence of the Chairman of the National Mediation Board. Progress *was* being made; sincere desire for agreement *was* evident; in short, collective bargaining was taking place. Had there been no litigation, caused by *another* dispute, ". . . probably the engineers and the Company could eventually have found a compromise" (R. 37b).

When qualitative evaluation of such situations is required, are District Courts to be the end of the judicial road? Is litigation of refusal to bargain charges to be denied the benefits of the unifying principle of appellate review? Are individual District Courts to perform without supervision a specialized role in evaluating bargaining under the Railway Labor Act comparable with that performed by the NLRB under the National Labor Relations Act? In the absence of a clear statement by Congress, we think not.

At issue is the proper functioning of appellate review in the federal courts—a matter over which the Supreme Court has prime responsibility. Moreover, assessment of the qualitative aspects of collective bargaining implicit in the District Court's decision is especially needed in this case because the result will affect bargaining procedures generally and the widespread practice of joint bargaining in particular. What Judge Friendly called "the important

legal issue here" transcends the confines of this particular case, and leads us to ask that certiorari be granted for its review (329 F. 2d at 23; Jt. App. 25).

II

Our second reason for seeking certiorari involves the functioning of the National Mediation Board.

The National Mediation Board has broad statutory powers. The NMB is charged with the responsibility of determining bargaining representatives for employees (45 U. S. C. §152 Ninth). It also mediates "major" disputes arising under the Railway Labor Act (45 U. S. C. §§155 First (a), 183(a)). In addition, it has jurisdiction over "any other dispute not referable to an adjustment board as hereinafter provided, and not adjusted in conferences between the parties, *or where conferences are refused*" (45 U. S. C. §183(b); emphasis added).

The majority opinion below finds justification for the injunction in *Virginian Railway Co.* v. *System Federation No. 40,* 300 U. S. 515 (1937) (329 F. 2d at 21-22; Jt. App. 20-21). In *Virginian Railway,* however, the injunction *gave effect* to the work of the National Mediation Board; here, the injunction is at cross purposes with the Board's work.

Following *Virginian Railway,* the Supreme Court has never sustained an injunction working at cross purposes with those matters committed to the jurisdiction of the National Mediation Board: *General Committee* v. *M-K-T R.,* 320 U. S. 323 (1943); *General Committee* v. *Southern*

Pacific Co., 320 U. S. 338 (1943); *Brotherhood of Railway & Steamship Clerks* v. *United Transport Service Employees*, 320 U. S. 715 (1943); *Switchmen's Union* v. *National Mediation Board*, 320 U. S. 297 (1943).

The *M-K-T* case, *supra*, bars judicial intervention having even a *possibility* of working at cross purposes with the National Mediation Board. That case, as here, involved a suit by a union arising out of an alleged violation of the duty to bargain. The Court held that it had no jurisdiction, saying "The concept of mediation is the antithesis of justiciability" (320 U. S. at 337).*

The facts of this case demonstrate the wisdom of the foregoing statement: until the flight engineer union sued to intervene, bargaining was progressing under the auspices of the Chairman of the National Mediation Board; in the heat of litigation, bargaining soon withered.

Judge Friendly's dissent points out that the majority decision ". . . makes the federal courts a second ring for airline and railroad bargaining disputes in contravention of the statutory plan" (329 F. 2d at 22; Jt. App. 22). The obvious effect will be to attract a flood of litigation concern-

* Nor do the cases cited in the Court of Appeals' opinion vary this rule (329 F. 2d at 20-22; Jt. App. 18-21). None of them even involve the National Mediation Board. To the extent that they refer to administrative procedures, the procedures are given effect, not undermined. The *Chicago River* case, 353 U. S. 30, concerns an injunction to give effect to the procedures of the Adjustment Board; the *Central Airlines* case, 372 U. S. 682, is an action to enforce an Adjustment Board award; the *Howard* case, 343 U. S. 768, concerns an injunction to prohibit racial discrimination; and in *Brotherhood of Railroad Trainmen* v. *Toledo, P. & W. R.*, 321 U. S. 50 (1944), an injunction was *denied* for failure to comply with the Norris-LaGuardia Act's "best efforts" requirement.

ing Railway Labor Act bargaining problems. Whether Congress intended the federal courts to become a handmaiden to the bargaining table, at cross purposes with the work of the National Mediation Board, is a question which deserves review by this Court. As Judge Friendly said (329 F. 2d at 30; Jt. App. 37-38):

> "Courts are ill equipped to assist in solving controversies like this; I cannot help thinking that the diversion of the energies of the parties incident to compiling this enormous record, with 21 days of depositions or hearings, more than 3600 pages of depositions and trial transcript and hundreds of exhibits, in which every nuance of the negotiations was explored in tiresome detail, and the attending exacerbations, have postponed rather than expedited a solution of the engineers' problems—not to speak of the drain on the time of an over-burdened district court."

III

Our third reason for seeking certiorari has to do with a question of first impression involving the Norris-LaGuardia Act.

This Court has held that conflicts between the Norris-LaGuardia Act and the Railway Labor Act are to be "accommodated" in "minor" disputes. See *Brotherhood of Railroad Trainmen* v. *Chicago River & Indiana R. Co.*, 353 U. S. 30 at 40 (1957). But the case at bar is what has been held to be a "major" dispute and, in "major" disputes, it is clear that the requirements of the Norris-LaGuardia Act apply—at least in suits against unions. *Order of Railroad Telegraphers* v. *Chicago & North Western R. Co.*, 362 U. S.

330 (1960). Does the Norris-LaGuardia Act embody a double standard in suits against employers? The legislative history does not support such a view. The Report of the Senate Committee on the Judiciary on the Norris-LaGuardia Act (S. Rep. No. 163, 72d Cong., 1st Sess. (1932), p. 19), states:

> "The same rule throughout the bill, wherever it is applicable, applies both to employers and employees, and also to organizations of employers and employees."

See also Note, 77 Harv. L. Rev. 1150 at 1151 (April, 1964).

Moreover, as the dissent points out, the requirement of "accommodation" is applicable only in case of conflict in the statutory provisions; here, there is no conflict (329 F. 2d at 31; Jt. App. 40): Section 8 of the Norris-LaGuardia Act requires proof of "every reasonable effort" to resolve the dispute (29 U. S. C. §108); Section 2 First of the Railway Labor Act likewise contains an "every reasonable effort" requirement (45 U. S. C. §152 First). As to this requirement, Judge Friendly said, "I cannot see how it could be found that when the [flight engineer union] sought an injunction, it had made 'every reasonable effort to settle' the dispute as to the handling of its opener of February 28, 1963, 'either by negotiation or with the aid of any available governmental machinery of mediation or voluntary arbitration' " (329 F. 2d at 31; Jt. App. 40).

Nor is the Railway Labor Act in any way inconsistent with the mandate in Section 7 of the Norris-LaGuardia Act —and the general principle of equity—that proof of irreparable injury is a jurisdictional requirement for the issuance of an injunction (29 U. S. C. §107). In this case,

American voluntarily signified its willingness to bargain separately with the flight engineer union over a month before the injunction was issued, and negotiations had resumed. Thus, there simply was no immediate and irreparable injury threatened at that time which an injunction was needed to prevent (329 F. 2d at 31; Jt. App. 40-41).

Judge Friendly stressed that judicial intervention in labor disputes is to be avoided, in the absence of "compelling need" (329 F. 2d at 32; Jt. App. 41). Here, there was no compelling need for judicial intervention, and the courts below should have followed the example which has been set by this Court in similar circumstances. *Brotherhood of Railroad Trainmen* v. *Chicago & Illinois R.*, 375 U. S. 18 (1963); *Publishers Association* v. *New York Mailers' Union*, 376 U. S. 775 (1964).

Conclusion

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Dated: New York, New York,
September 3, 1964.

Respectfully submitted,

ARTHUR M. WISEHART
Attorney for Petitioner
633 Third Avenue
New York, New York 10017

212 TN 7-1234

GEORGE A. SPATER
Of Counsel